IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE: NEW MEDIA INVESTORS II, LLC	)	No. 71,2026
	)	
	)	Court Below: Court of Chancery of the State of Delaware Consolidated C.A. Nos. 2024-0413-LWW and 2024-1357-LWW
	)	

APPELLEE JENZABAR, INC'S ANSWERING BRIEF

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES iv

NATURE OF PROCEEDINGS 1

SUMMARY OF ARGUMENT 3

STATEMENT OF FACTS 5

A. NMII Is Formed 5

B. The Initial Warrants Expire 5

C. Maginn Negotiates with the Board on Behalf of the NMII Entities and Jenzabar Issues Replacement Warrants 6

D. Maginn Winds Up and Ultimately Cancels NMII 8

E. Appellants Initiate this Action While NMII Remains Cancelled 8

F. The Court of Chancery Dismisses the Second Amended Complaint 9

ARGUMENT 12

I. THE COURT OF CHANCERY CORRECTLY FOUND THAT APPELLANTS LACK STANDING 12

A. Question Presented 12

B. Standard and Scope of Review 12

C. Merits of Argument 12

1. Appellants Have Failed to State a Claim for Nullification 14

a. NMII's Cancellation Resulted in No Statutory Violation 14

b. An Unmatured Claim that Belongs to the LLC is not an Asset Subject to Distribution in a Wind Up and Does Not Provide Grounds for Nullification 16

2. Even if Appellants Did Plead a Claim for Nullification, Any Error is Harmless Because the Nullification Claim is Time-Barred 22

a. The Nullification is Time-Barred and There is no Basis to Toll the Statute of Limitations 22

b. Because Revival is Time-Barred, Appellants' Remaining Claims Must Be Dismissed 25

3. Appellants' Declaratory Judgment Claim Is Not a Nullification Claim 26

II. THE COURT OF CHANCERY CORRECTLY FOUND ALL OF APPELLANTS' CLAIMS WERE DERIVATIVE 28

A. Question Presented 28

B. Standard and Scope of Review 28

C. Merits of Argument 28

1. Appellants Failed to Make This Argument Below and it is Waived 29

2. Appellants' Argument is Unsupported by Law and their Own Pleadings 31

III. THE COURT OF CHANCERY CORRECTLY FOUND THAT THERE WAS NO BASIS TO EXTEND EQUITABLE STANDING TO APPELLANTS 33

A. Question Presented 33

B. Standard and Scope of Review 33

C. Merits of Argument 33

1. Equity Aids the Vigilant 34

2. Other Avenues of Relief Are Theoretically Available 36

CONCLUSION 38

TABLE OF AUTHORITIES

Page(s)

Cases

Adams v. Jankouskas,
452 A.2d 148 (Del. 1982) 34

Beebe Med. Ctr., Inc. v. Bailey,
913 A.2d 543 (Del. 2006) 30

Brookfield Asset Mgmt., Inc. v. Rosson,
261 A.3d 1251 (Del. 2021) 28

Capone v. LDH Mgmt. Holdings LLC,
2018 WL 1956282 (Del. Ch. Apr. 25, 2018) 17, 19

In re Carlisle Etcetera LLC,
114 A.3d 592 (Del. Ch. 2015) 35

Deane v. Maginn,
2022 WL 16557974 (Del. Ch. Nov. 1, 2022),
aff'd, 338 A.3d 1292 (Del. Jan. 31, 2025) 7

Deane v. Maginn,
2022 WL 624415 (Del. Ch. Mar. 2, 2022) 7, 8

El Paso Pipeline GP Co., LLC v. Brinckerhoff,
152 A.3d 1248 (Del. 2016) 12

First State Towing, LLC v. Div. of State Police,
2016 WL 2621137 (Del. Ch. May 5, 2016) 23, 24

Jepsco, Ltd. v. B.F. Rich Co.,
2013 WL 593664 (Del. Ch. Feb. 14, 2013),
aff'd, 676 A.2d 905 (Del. 1996) 24

Joseph Penar Fam. Tr. v. Adams,
2016 WL 1730765 (Del. Ch. Apr. 28, 2016),
aff'd, 151 A.3d 896 (Del. 2016) 32

Klauder v. Echo/RT Holdings, LLC,
152 A.3d 581 (Del. 2016) 28, 30

Levey v. Brownstone Asset Mgmt., LP,
76 A.3d 764 (Del. 2013) 34

Marvel v. Clay,
1995 WL 465322 (Del. Super. Ct. June 15, 1995),
aff'd, 676 A.2d 905 (Del. 1996) 24

Matthew v. Laudamiel,
2012 WL 605589 (Del. Ch. Feb. 21, 2012) 18, 19, 20, 25

Metro Communications Corp. BVI v. Advanced Mobilecomm Technologies, Inc., 854 A.2d 121 (Del. Ch. 2004) 18, 19, 23

In re New Media Invs. II, LLC,
2026 WL 208698 (Del. Ch. Jan. 27, 2026) ....*passim*

Orman v. Cullman,
794 A.2d 5 (Del. Ch. 2002) 23

PXP Producing Co. v. MitEnergy Upstream LLC,
342 A.3d 402 (Del. Ch. June 26, 2025) 23

In re Reinz Wisconsin Gasket, LLC,
2023 WL 2568326 (Del. Ch. Mar. 20, 2023) 17

In re Reinz Wisconsin Gasket, LLC,
2026 WL 904110 (Del. Ch. Apr. 2, 2026) 14, 16, 17

Rollins Int'l, Inc. v. Int'l Hydronics Corp.,
303 A.2d 660 (Del. 1973) 26

Roofers, Inc. v. Delaware Dep't of Lab.,
-- A.3d --, 2014 WL 7010733 (Del. Nov. 24, 2014 ....29, 30

Schick Inc. v. Amalgamated Clothing & Textile Workers Union,
533 A.2d 1235 (Del. Ch. 1987) 26, 27

Schoon v. Smith,
953 A.2d 196 (Del. 2008) 33, 36

Schwaber v. Margalit,
2022 WL 2719952 (Del. Ch. July 13, 2022) 21, 22

SDF Funding LLC v. Fry,
2022 WL 1511594 (Del. Ch. May 13, 2022)....................................36, 37

Suber v. State,
2026 WL 184867 (Del. Jan. 15, 2026) 31

Thor Merritt Square, LLC v. Bayview Malls LLC,
2010 WL 972776 (Del. Ch. Mar. 5, 2010) 17, 23

Unitrin, Inc. v. Am. Gen. Corp.,
651 A.2d 1361 (Del. 1995) 22

Statutes

6 *Del. C.* § 18-804(b)(2) 15

Other Authorities

Supr. Ct. R 8....................................30

NATURE OF PROCEEDINGS

The Court of Chancery applied long-standing Delaware law in dismissing Appellants Felicia Gross ("Gross"), Sheila Nassberg ("Nassberg"), and Paul Fireman ("Fireman," and together with Gross and Nassberg, "Appellants") Second Amended Complaint ("SAC"). The Court of Chancery dismissed the SAC without prejudice on an uncontroversial basis that—to have standing to bring derivative claims on behalf of a cancelled LLC, a party must first seek to nullify its certificate of cancellation and revive an entity before prosecuting derivative claims on its behalf. Specifically, the Court of Chancery held that Appellants lacked standing when they filed their initial complaint because New Media II ("NMII" or the "Company") remained a cancelled entity and as a result, they did not have standing to pursue derivative claims on its behalf.

Despite this problem, Appellants seek to appeal the Court of Chancery's decision on hollow grounds. The appeal appears to be based on fundamental misunderstandings or misinterpretations of Delaware law. Appellants confuse direct with derivative claims, conflate derivative claims belonging to NMII with claims against the Company itself, conflate derivative claims belonging to NMII with assets subject to distribution upon its cancellation, miscite case law for purported propositions, and make arguments that contradict their own pleading. But even if Appellants arguments comported with Delaware law, their appeal and this action face an insurmountable threshold problem—any claim to revive NMII is time-barred, and therefore, they can never obtain standing to assert their derivative claims on behalf of NMII because it cannot be revived to provide standing to assert such derivative claims. Equitable standing also does not save Appellants' deficient claims.

The Court of Chancery's well-reasoned decision dismissing Appellants' claims should be affirmed. This is Jenzabar, Inc.'s ("Jenzabar") Answering Brief.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery did not err when it held that Appellants lacked standing to pursue derivative claims on behalf NMII—a cancelled entity. Settled case law only permits a plaintiff to seek redress for derivative claims belonging to a cancelled LLC if the plaintiff successfully asserts a claim for nullification of the LLC's cancellation and revives the LLC. Appellants have failed to assert a nullification claim and, thus, lack standing to prosecute derivative claims on NMII's behalf. Appellants' conduct—moving to nullify cancellation and seeking to have the cancellation nullified in a filing with the Secretary of State after initiating this action—demonstrates that they did not bring a nullification claim in their SAC. But even if Appellants had brought such a claim, because they have not asserted a direct claim against NMII, to have standing to maintain derivative claims, Appellants were required to first seek nullification and successfully revive the cancelled LLC before asserting their derivative claims. They failed to do so, and thus, lack standing to simultaneously pursue nullification and maintain derivative claims on behalf of NMII in the same action. But even if Appellants were permitted to simultaneously pursue nullification and maintain derivative claims on behalf of NMII, Appellants have nevertheless failed to adequately state a basis for nullification of the cancellation in the SAC. Accordingly, the Court did not err in dismissing Appellants' claims for lack of standing. Finally, even assuming that

Appellants had pled a claim for nullification, any error was harmless because the nullification claim is barred by the statute of limitations, and hence, they would still lack standing to assert derivative claims on behalf of NMII.

2. Denied. The Court of Chancery did not err when it found that all of Appellants' claims were derivative. Appellants now attempt to argue that Counts I, III, and V are direct due to harms suffered by the members of NMII when Maginn did not distribute NMII's assets upon being wound up. This argument was not fairly presented to the Court of Chancery and, thus, cannot be raised on appeal. However, even if this argument was not waived, it is unsupported by the law and Appellants' own pleading, which indicates that NMII had no assets to distribute when it was wound up.

3. Denied. The Court of Chancery did not err when it denied extending equitable standing to Appellants. As the Court of Chancery observed, "[h]aving neglected to exercise diligence to safeguard their rights, the plaintiffs cannot rely on equity to cure their lack of standing."[1] Appellants slept on their rights, failed to exercise reasonable diligence, and have other theoretical avenues of relief available to them—all those reasons preclude an extension of equitable standing to Appellants.

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[1] *In re New Media Invs. II, LLC*, 2026 WL 208698, at *9 (Del. Ch. Jan. 27, 2026) (hereinafter "*New Media*").

STATEMENT OF FACTS

A. NMII Is Formed

Maginn formed NMII as a Delaware limited liability company to serve as an investment vehicle for Jenzabar in 1999.[2] Maginn served as NMII's manager from its inception until it was dissolved in 2017.[3] In connection with his position as manager of NMII, Maginn solicited investments in NMII.[4] The SAC alleges that Appellants invested in NMII and became its members.[5]

In 2004, NMII received warrants to purchase Jenzabar stock in connection with a recapitalization of Jenzabar.[6] The warrants authorized NMII "to purchase up to 'approximately 2,449,623 shares' of Common stock in Jenzabar at an exercise price of $0.89 per share."[7] The warrants were exercisable by paying the exercise price or through a cashless exchange if Jenzabar's stock price exceeded the exercise price of $0.89 per share.[8]

B. The Initial Warrants Expire

NMII's warrants in Jenzabar ultimately expired in 2011 without being exercised.[9] Jenzabar's investment banker had conducted a valuation that valued

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[2] A0228, ¶ 4.
[3] A0234, ¶ 32.
[4] A0228, ¶ 4.
[5] *Id.*
[6] A0229, ¶ 8.
[7] A0237, ¶ 40.
[8] A0245, ¶ 58.
[9] *Id.*

Jenzabar shares at $.66 per share.[10] Thus, based on that valuation, the warrants were "out-of-the-money", and the cashless exercise option was unavailable to NMII.[11]

C. Maginn Negotiates with the Board on Behalf of the NMII Entities and Jenzabar Issues Replacement Warrants

The Special Committee was created in part by the Jenzabar Board to negotiate transactions associated with the NMII entities.[12] Maginn recused himself from Jenzabar decisions related to the NMII entities and negotiated on the entities' behalf with the Special Committee.[13] In connection with these negotiations, Maginn acted as a fiduciary for both NMII and New Media II-B ("NMII-B"), its sister entity.[14]

Maginn represented to the Special Committee that he sought replacement warrants for NMII in the negotiations.[15] Maginn highlighted the potential risks of not issuing replacement warrants to the Special Committee, specifically that certain NMII members were considering litigation over the expired warrants.[16] He also indicated that if the replacement warrants were not issued, some individual members of NMII may decide to exercise the warrants prior to their expiration, which could have had the effect of further complicating Jenzabar's capital structure.[17]

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[10] A0246, ¶ 62.
[11] *Id.*, ¶ 63.
[12] A0249, ¶ 69.
[13] A0250, ¶ 75.
[14] A0251, ¶ 76.
[15] A0251–52, ¶ 77.
[16] A0252, ¶ 78.
[17] A0252, ¶ 80.

Ultimately, Maginn was able to negotiate replacement warrants for "New Media."[18] Maginn had the warrants issued to New Media II-C ("NMII-C"), which he characterized to the Special Committee as the "'successor entity' to New Media II and New Media II-B."[19] In connection with the issuance of the warrants, Jenzabar had KPMG perform a valuation of the its stock, which resulted in an exercise price of $0.47 for the warrants.[20] Maginn used $65,000 in funds from NMII and NMII-B to purchase the warrants from Jenzabar.[21]

The Special Committee, which issued the warrants to NMII-C, believed the warrants were being issued "to encourage the New Media members' continued investment in Jenzabar."[22] In an action related to NMII-B, the lone surviving member of the Special Committee "testified that he only became aware in 2021 that the II-C Warrants had not been issued to 'encourage the New Media investors in their attitude toward the company' but rather to Maginn."[23] Thus, Maginn deceived the Special Committee into believing that warrants were being issued to the members of NMII and NMII-B.[24]

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[18] A0253, ¶ 83.
[19] A0254, ¶ 84.
[20] *Id.*
[21] *Id.*
[22] *Deane v. Maginn*, 2022 WL 16557974, at *4, *18 (Del. Ch. Nov. 1, 2022), *aff'd*, 338 A.3d 1292 (Del. Jan. 31, 2025) ("The Special Committee believed that the II-C Warrant would go to a 'successor entity' to New Media II and New Media II-B.").
[23] *Deane v. Maginn*, 2022 WL 624415, at *11 (Del. Ch. Mar. 2, 2022).
[24] *See id.*

D. Maginn Winds Up and Ultimately Cancels NMII

On December 19, 2013, Maginn sent NMII's members a letter describing the new opportunity to participate in NMII-C.[25] The letter also explained to the members that the investment in NMII had "conclude[ed]" and included a final payout in the form of a check and a general release.[26] Contemporaneous banking statements indicate that all Appellants[27] that were currently members of NMII at the time cashed their checks.[28] Maginn cancelled NMII's registration in Delaware by filing a certificate of cancellation on December 28, 2017.[29]

E. Appellants Initiate this Action While NMII Remains Cancelled

Approximately six and half years after NMII was cancelled, Gross initiated this action by filing a verified complaint (the "Complaint") on April 22, 2024.[30] The various Defendants moved to dismiss the Complaint in mid-May 2024.[31] Just over two months after this action was initiated, on June 25, 2024, Appellants filed their first Motion to Nullify the cancellation of NMII.[32]

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[25] A0259, ¶ 95; A0260, ¶ 98.
[26] *Id.* ¶¶ 95–96.
[27] Appellant Nassberg's membership interests had been redeemed over a year earlier in June 2012. A0503. Her check was also cashed. *Id.*
[28] A0501–05.
[29] A0283, ¶ 215.
[30] A0001.
[31] A0005–06.
[32] A0007–08.

On March 26, 2025, Appellants filed the First Amended Complaint ("FAC").[33] One month later, Appellants moved for permissive joinder to add Till Vestring as a Plaintiff.[34] Two months after filing the FAC, Appellants moved to consolidate this action with a similar action filed by Paul Fireman ("Fireman Action").[35] On June 16, 2025, the Court of Chancery denied joinder, but consolidated the action with the Fireman Action.[36]

F. The Court of Chancery Dismisses the Second Amended Complaint

Appellants filed the Second Amended Compliant ("SAC") on June 25, 2025.[37] Several weeks later, Appellants also filed their Renewed Motion to Nullify the cancellation of NMII.[38] The Defendants subsequently moved to dismiss the SAC in late July, 2025.[39] The basis of Jenzabar's motion to dismiss was focused in-part on Appellants lack of standing to act for a cancelled entity in pursuing derivative claims on behalf of said cancelled entity.[40] Jenzabar argued in its briefs that Appellants failed to bring or state a claim for nullification, but even if they had, such a claim

[33] A0011.
[34] A0012.
[35] A0015.
[36] A0016.
[37] A0017.
[38] A0018.
[39] A0019–25.
[40] A0372–74.

was barred by the statute of limitations.[41] Accordingly, because NMII could not be revived, all of Appellants' claims failed because they lacked standing to act on its behalf.[42]

On January 27, 2026, the Court of Chancery dismissed Appellants' claims without prejudice on standing grounds.[43] The Court of Chancery held that "any recovery the plaintiffs might receive would be "pro rata in proportion with their ownership of [New Media II] []" and, accordingly, all claims were derivative.[44] The Court of Chancery further held that because NMII was cancelled, appellants could not pursue claim on its behalf until it was revived and because they "did not plead a claim for nullification in conjunction with their derivative claims, they lacked standing when they filed this suit."[45] Finally, the Court of Chancery held that equitable standing was unavailable to the Appellants because "other avenues for relief exist for the [entity], even if only theoretical" and because they had "neglected to exercise diligence to safeguard their rights[.]"[46] Appellants have appealed this judgment of dismissal. Jenzabar respectfully asks this Court to affirm the Court of

[41] A0368–72.
[42] A0373–78.
[43] *New Media*, 2026 WL 208698, at *10.
[44] *Id.* at *6 (citation omitted).
[45] *Id.* at *8.
[46] *Id.* at *9 (citation omitted).

Chancery's well-reasoned opinion and judgment dismissing Appellants' claims without prejudice.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY FOUND THAT APPELLANTS LACK STANDING

A. Question Presented

Did the Court err when it found that Appellants lacked standing because they (1) could not bring derivative claims on the cancelled entity's behalf and stated no direct claims against the cancelled entity; (2) failed to bring or state a claim for nullification in their operative pleading; and (3) sought to revive the entity mid-litigation via a motion and filings with the Secretary of State? This argument was preserved below at A0372–79.

B. Standard and Scope of Review

"Whether a party has standing is a question of law that is subject to *de novo* review."[47]

C. Merits of Argument

The Appellants claim that the SAC "state[s] a nullification claim."[48] However, such a contention is directly belied by their operative pleading and the conduct in this litigation. To obtain nullification of a cancelled entity, a party must

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[47] *El Paso Pipeline GP Co., LLC v. Brinckerhoff*, 152 A.3d 1248, 1256 (Del. 2016).

[48] Appellants also reference that other iterations of the complaints filed in this action contain a nullification claim. Op. Br. at 23. This is both irrelevant and untrue—Appellants adopted the SAC as the operative pleading and its flaws are what led to the Court of Chancery's dismissal.

have a basis for nullification. Here, the SAC states no claim for nullification because it does not identify a legally-cognizable basis to revive the entity. Moreover, Appellants own conduct indicates that they did not even bring a nullification claim. Appellants brought a motion for nullification *mid-litigation* and filed the purported certificate with the Delaware Secretary of State. If Appellants intended to bring a nullification claim, why not bring a claim identified as such[49] rather than disguising any purported nullification claim as a declaratory judgment claim? In short, Appellants have failed to state a nullification claim, and thus they lack standing to assert derivative claims on behalf of NMII. But even if Appellants had brought such a claim, because they have not asserted a direct claim against NMII, to have standing to maintain derivative claims, Appellants were required to first seek nullification and successfully revive the cancelled LLC before asserting their derivative claims. They failed to do so, and thus, lack standing to simultaneously pursue nullification and maintain derivative claims on behalf of NMII in the same action. Finally, Appellants face the insurmountable threshold issue that even if the SAC properly stated a nullification claim, any such claim is time-barred, which prevents Appellants from ever obtaining standing to assert their derivative claims on behalf of NMII because it cannot be revived.

[49] Appellants admit that they are now seeking this precise relief in a new action wherein they are petitioning for nullification. Op. Br. at 17 n.86.

1. Appellants Have Failed to State a Claim for Nullification

To nullify a certificate of cancellation, a party must plead a violation of Sections 18-203 or 18-804 of Delaware's Limited Liability Company Act (the "LLC Act").[50] Here, the SAC pleads no statutory violation supporting nullification of the certificate of cancellation.

a. NMII's Cancellation Resulted in No Statutory Violations

First, Appellants did not plead facts demonstrating that there was an unlawful dissolution. Appellants claims that "Maginn did not have the unilateral power to wind-up and dissolve New Media II-B."[51] They base this contention on Maginn allegedly not receiving a vote of the members prior to dissolution.[52] But this ignores the fact that none of the Appellants were members of New Media with the rights to vote on dissolution when Maginn filed the certificate of cancellation in 2017. As the Court of Chancery noted, "in December 2013, Maginn sent New Media II members letters stating that their investments were 'concluded' and enclosing a 'final check' and release."[53] Accordingly, Appellants had ceased being members of New Media II four years prior to the New Media II's cancellation. Thus, there were no members other than Maginn entitled to vote on the cancellation.

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[50] *In re Reinz Wisconsin Gasket, LLC*, 2026 WL 904110, at *11 (Del. Ch. Apr. 2, 2026).
[51] Op. Br. at 25 (citation omitted).
[52] *Id.*
[53] *New Media*, 2026 WL 208698, at *2.

Next, Appellants argue that the cancellation violated Section 18-804 of the LLC Act because New Media II "failed to distribute its assets as required by § 18-804(a)."[54] But again, this argument ignores the pleadings. The timing is important. New Media II was wound up in 2017. As alleged in the SAC, Maginn communicated to New Media II members "that their investment 'concluded'" in "May 2013, well after he had already acquired the new warrants."[55] Accordingly, at least four and half years before the cancellation, New Media II did not hold the warrants, which Appellants contend should have distributed to its members. Thus, as pled, New Media II did not hold any assets for distribution when it was cancelled.

Appellants alternative argument—that "the violation of § 18-804(a)(3) lies in Maginn's failure to distribute the value of claims arising from Defendants' misconduct"[56]—has no basis in law or fact. Section 18-804(b)(2) provides that an LLC "[s]hall make such provision as will be reasonably likely to be sufficient to provide compensation for any claim against the limited liability company which is the subject of a pending action, suit or proceeding to which the limited liability company is a party[.]"[57] "Section 18-804(b)(3) requires the LLC to do the same for foreseeable future claims 'likely to arise or become known to the limited liability

[54] Op. Br. at 27.
[55] A0258, ¶¶ 91, 92.
[56] Op. Br. at 29.
[57] 6 *Del. C.* § 18-804(b)(2).

company within 10 years after the date of dissolution.'"[58] Specifically, this requires an LLC to set aside assets (if it possesses such assets) "to compensate plaintiffs in pending or likely claims when it dissolved."[59] Here, the claim that Appellants reference is derivative and *belonged to NMII*—specifically, a claim NMII potentially had against Maginn for breach of fiduciary duties, not a claim *against* NMII. Accordingly, Section 18-804 does not apply on its face. Moreover, it would result in the absurd outcome of the allegedly wronged LLC setting aside funds to compensate itself—this defies logic and Appellants cite nothing in support of this contention.

b. An Unmatured Claim that Belongs to the LLC is not an Asset Subject to Distribution in a Wind Up and Does Not Provide Grounds for Nullification

Appellants also contend that this unmatured claim against Maginn should have been distributed to its members upon winding up. But this confuses an asset of an LLC subject to distribution upon cancellation with a derivative claim belonging to NMII. Appellants do not cite authority for this proposition.

Appellants appear to be basing this argument on a misunderstanding of Delaware precedent. Appellants state that "[w]hen a manager causes an LLC to improperly dissolve or wind up especially to extinguish colorable claims against

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[58] *In re Reinz*, 2026 WL 904110, at *11 (citation omitted).
[59] *Id.*

him—courts may grant nullification to revive the entity."[60] But a cursory review of the cases cited in support of that proposition finds no support.[61] For example, Appellants cite *In re Reinz Wisconsin Gasket, LLC*,[62] but that case does not stand for this proposition. *In re Reinz* concerned the appointment of a receiver and deferred a decision on nullification.[63] Moreover, the claims were direct against the LLC itself, not its managers, which was the basis for seeking nullification. Thus, *In re Reinz* is plainly distinguishable. *Capone v. LDH Mgmt. Holdings LLC*[64] is similarly inapt. There the LLC was revived because it did not "set[] aside a reserve to cover the Plaintiffs' breach of contract claims[]" against the cancelled entities.[65] Again, the basis for nullification was that there were direct claims against the LLC that had been unaccounted for when it was cancelled, not derivative claims belonging to the LLC against its former manager.[66] *Thor Merritt Square, LLC v. Bayview Malls LLC*, is the same.[67] Again, it involved the failure to set aside funds for unmatured direct claims against the LLC, not claims belonging to the LLC against its manager.[68]

[60] Op. Br. at 22.
[61] *Id.* at 22 n.108.
[62] 2023 WL 2568326, at *13 (Del. Ch. Mar. 20, 2023).
[63] The Court ultimately found that nullification was not warranted. *In re Reinz*, 2026 WL 904110, at *21.
[64] 2018 WL 1956282 (Del. Ch. Apr. 25, 2018).
[65] *Id.* at *7.
[66] *Id.*
[67] 2010 WL 972776 (Del. Ch. Mar. 5, 2010).
[68] *Id.* at *5.

None of those cases support the proposition that an LLC must account for derivative claims against its manager belonging to the LLC before it is cancelled.

Contrary to Appellants' assertion otherwise, these cases actually demonstrate that in order to seek nullification on the basis of the failure to account for claims, those claims must be direct claims against the cancelled LLC. Here, the Appellants only brought derivative claims, and, thus, have no basis to simultaneously pursue nullification.[69] *Matthew v. Laudamiel*[70] and *Metro Communications Corp. BVI v. Advanced Mobilecomm Technologies, Inc.*[71] are instructive of this point. While *Metro* indicated that derivative claims could be brought alongside a nullification claim, the *Metro* Court only made that observation after finding that the plaintiff there had stated direct claims against the cancelled entity.[72] By virtue of that live direct claim, the *Metro* plaintiff established a basis to seek nullification of the entity's cancelled status.[73] Thus, standing was not a gatekeeping issue in the

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[69] *New Media,* 2026 WL 20869, at *8.
[70] 2012 WL 605589 (Del. Ch. Feb. 21, 2012).
[71] 854 A.2d 121 (Del. Ch. 2004).
[72] *Id.* at 138–140 (denying the motion to dismiss the direct breach of contract claim against the cancelled entity).
[73] *Id.* at 164 ("Metro apparently argues that Fidelity Brazil's failure to make reasonable provision for Metro's claims against Fidelity Brazil based on the LLC Agreement upon the winding up and dissolution of Fidelity Brazil violated § 18–804(b)(3). As discussed above, this is a tenable argument and states a claim that Fidelity Brazil's certificate of cancellation should be nullified so that Metro can sue Fidelity Brazil directly and bring derivative actions on Fidelity Brazil's behalf…") (footnote omitted).

litigation—the plaintiff had established standing through the direct claim, not derivative claims like those brought by Appellants.[74] Moreover, nullification was not sought in *Metro* to establish standing—as stated above, the direct claims established its standing—but rather to "ensure that the entity ha[d] sufficient funds to satisfy any judgment [the plaintiff] obtain[ed] against it."[75] Thus, *Metro* actually cuts against Appellants arguments for standing.

Matthew further emphasizes that point. There the Court opined that derivative claims might be brought "in conjunction with" a nullification action, but did not hold that derivative claims alone would serve as a basis for nullification.[76] As demonstrated in *Metro, In re Reinz*, *Capone*, and *Thor Merritt Square* direct claims must be brought against the cancelled LLC to support a claim for nullification.[77] Indeed, *Matthew* stands for the uncontroversial proposition that "after the filing of the certificate of cancellation, [derivative] claims must be brought in the name of the LLC by a trustee or receiver ... or directly by the LLC or ***derivatively by its members after reviving the LLC by obtaining revocation of its certificate of cancellation***."[78] This is consistent with the other holdings discussed, wherein derivative claims belong to the LLC do not serve as a basis for nullification of its cancellation and can

[74] *Id.*
[75] *Id.* at 165.
[76] *Matthew*, 2012 WL 605589, at *21.
[77] *See supra* 16–18.
[78] *Matthew*, 2012 WL 605589, at *21 (emphasis added).

only be pursued after the entity is revived on separate grounds; for example, cancelling without accounting for claims against the LLC before distributing remaining assets to members.

Moreover, when *Metro* and *Matthews* are read together, their instruction demonstrates that derivative claims alone are not a sufficient basis to nullify the cancellation of an entity to which the derivative claims belong.[79] Without a direct claim against the cancelled entity to provide standing, a plaintiff would have to first seek nullification of the cancellation to pursue derivative claims on the cancelled entity's behalf.[80] Appellants do not assert any direct claim against NMII, and therefore, to have standing to maintain derivative claims, Appellants were required to first seek nullification and successfully revive NMII before asserting their derivative claims on its behalf.[81] Appellants failed to do so, and accordingly, for this reason also, lack standing to simultaneously pursue nullification and maintain derivative claims on behalf of NMII in the same action.[82]

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[79] *See supra* 17–19.

[80] *Matthew*, 2012 WL 605589, at *21.

[81] *Id.*; *New Media*, 2026 WL 208698, at *8 ("But the plaintiffs here assert only derivative claims on behalf of a canceled entity, and thus lack standing to be in this court at all.").

[82] As discussed in the Opening Brief, Appellants now are attempting to do just that—nullify NMII's cancellation—in a separately filed action. Op. Br. at 17 n.86. Again, Appellants conduct is telling.

Appellants attempt to counter this consistent precedent by citing *Schwaber v. Margalit*[83] for the proposition that a court will "decline[] to dismiss a nullification claim alleging a failure to make reasonable provision for claims or causes of action belonging to canceled entities themselves."[84] But that is not what *Schwaber* stands for—*Schwaber* involved a motion to dismiss or stay in the alternative.[85] The motion to dismiss was brought pursuant to Court of Chancery Rule 12(b)(1), arguing that an alternative dispute provision in the governing documents of the LLC divested the Court of subject matter jurisdiction.[86] The Court denied the motion to dismiss but granted the motion to stay, which is the context in which the Court states the dicta that Appellants' quote.[87] The Court explained that in determining whether "defendants should have distributed or made reasonable provision for legal claims belonging to the Fund IV Entities[]" it would require the Court "to assess the merits of yet untested claims concerning the 2019 Transaction—the very claims the parties agreed to arbitrate", which could lead "to a ruling by this court before the arbitrators decide the plaintiffs' claims and perhaps to conflicting judgments."[88] Thus, the Court was not articulating any point regarding the sufficiency of the *Schwaber*

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[83] 2022 WL 2719952 (Del. Ch. July 13, 2022).
[84] Op. Br. at 33 (citing to *Schwaber*, 2022 WL 2719952, at **1, 3).
[85] *Schwaber*, 2022 WL 2719952, at *1.
[86] *Id.*
[87] *Id.* at *4.
[88] *Id.* at *3.

plaintiffs' claims with respect to their ability to pursue nullification as Appellants recitation suggests, but rather was commenting on the issues present in the analysis for granting a stay.[89] The issue for which this case is cited by Appellants simply was not before the Court. Accordingly, Schwaber is inapt and does not support the proposition that derivative claims belonging to a cancelled entity provide a basis for its revival.

2. Even if Appellants Did Plead a Claim for Nullification, Any Error is Harmless Because the Nullification Claim is Time-Barred

Regardless of whether Appellants attempted to plead a claim for nullification, any such claim is time-barred. While the Court of Chancery did not reach this issue, it was fairly presented and preserved below,[90] and this Court may affirm dismissal on this alternative basis.[91]

a. The Nullification is Time-Barred and There is no Basis to Toll the Statute of Limitations

Actions to revive an LLC that has been cancelled, like NMII, are governed by 6 *Del. C.* §§ 18-801-806. While the statute does not explicitly provide a statute of

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[89] *Id.*

[90] Preserved below at A0369–70.

[91] *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1390 (Del. 1995) ("We recognize that this Court may affirm on the basis of a different rationale than that which was articulated by the trial court. We also recognize that this Court may rule on an issue fairly presented to the trial court, even if it was not addressed by the trial court.").

limitations, the Court of Chancery has held that actions under Chapter 18 of the LLC Act are subject to an analogous three year statute of limitations.[92]

Here, the Appellants initiated this Action on April 22, 2024—roughly six and half years after it is alleged that Maginn dissolved and canceled NMII on December 18, 2017."[93] Accordingly, the purported claim for nullification was brought almost three and half years after the statute of limitations had run. This is fatal to Appellants' appeal.

Appellants pled no adequate basis to toll the statute of limitations in the SAC. The only allegations even remotely along these lines are purely conclusory.[94] But conclusory allegations do not support the application of the inherently unknowable injury doctrine, or any other tolling doctrine.[95] In fact, the Court of Chancery noted

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[92] *See Thor Merritt Square, LLC*, 2010 WL 972776, at *3 n.6) (observing that the analogous statute of limitations for a nullification claim is three years under 10 *Del. C.* § 8106); *Metro Commc'n*, 854 A.2d at 165 ("[A] three-year statute of limitations applies to actions under § 18–804[.]"); *PXP Producing Co. v. MitEnergy Upstream LLC*, 342 A.3d 402, 406–07 (Del. Ch. June 26, 2025) (recognizing that a claim to revive an LLC is subject to a three-year statute of limitations by analogy).

[93] A0283.

[94] *See* SAC ¶ 124 (alleging a "pattern of secretive misconduct" that allegedly "beguile[d]" Paul Fireman, "a founder of a large public company who had an inside understanding of Jenzabar as a Director for many years," "supports inherent unknowability, as applied to the Members of New Media II, and as to New Media II itself" and that these "same and similar facts and circumstances apply to equitable tolling and fraudulent concealment.").

[95] *Orman v. Cullman*, 794 A.2d 5, 5 (Del. Ch. 2002) (conclusory allegations unsupported by facts contained in a complaint will not be accepted as true); *First State Towing, LLC v. Div. of State Police*, 2016 WL 2621137, at *4 (Del. Ch. May 5, 2016) ("Plaintiffs bear the burden of pleading facts demonstrating that a tolling

in its Opinion because Appellants "neglected to exercise diligence to safeguard their rights" they could not rely on equitable principals to fix the flaws with their claims.[96]

Moreover, Appellants had constructive, if not actual notice, of the cancellation years ago. Appellants claimed in their Renewed Motion to Nullify that they "learned of Maginn's conduct and the resulting harm through the *Deane* case" when the *Deane* plaintiffs discovered that "[i]n December 2020, during the *Deane* litigation, Maginn also cancelled II-B's registration" and "Deane filed a Certificate of Correction" "on March 29, 2021."[97] NMII's certificate of cancellation is a public record. At the time of Appellants' discovery of NMII-B's cancellation on or before March 29, 2021, they unequivocally had actual knowledge, or constructive knowledge of the public record of its related-predecessor NMII's cancellation under the inherently unknowable injury doctrine.[98] Therefore, Appellants were on notice of NMII's cancellation at the latest on March 29, 2021.[99] Accordingly, even accepting tolling of the limitations period until March 29, 2021, the three-year

doctrine applies.").

[96] *New Media*, 2026 WL 208698, at *9.

[97] A0294.

[98] *See Jepsco, Ltd. v. B.F. Rich Co.*, 2013 WL 593664, at *11 (Del. Ch. Feb. 14, 2013) (statute of limitations not extended where claims based upon a publicly disclosed settlement plus knowledge that the settlement could implicate the plaintiff's asset); *see also Marvel v. Clay*, 1995 WL 465322, at *4 (Del. Super. Ct. June 15, 1995) (refusing to apply time of discovery rule where Division of Motor Vehicles records provided public notice of ownership concerning disputed motorcycle), *aff'd*, 676 A.2d 905 (Del. 1996).

[99] A0294.

limitations period to file a nullification claim of the certificate of cancellation of NMII expired on March 29, 2024, a month before Appellants filed their complaint on April 22, 2024. Accordingly, the nullification claim is time-barred and there is no basis to toll the statute of limitations.

b. Because Revival is Time-Barred, Appellants' Remaining Claims Must Be Dismissed

Without a concurrent nullification claim to pursue, the remaining claims must remain dismissed. As the Court of Chancery found and discussed further below, all of Appellants claims are derivative and belong to NMII.[100] Appellants cannot seek recovery on behalf of a cancelled entity until it is revived.[101] Because revival is time-barred, the Court may affirm the Court of Chancery's decision dismissing the SAC on this alternative basis.

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[100] *See New Media*, 2026 WL 208698, at *5–6 (describing that the claims as derivative under the *Tooley* Test because all involved alleged injuries to the entity NMII).

[101] *Matthew*, 2012 WL 605589, at *21 ("after the filing of the certificate of cancellation, such claims must be brought in the name of the LLC by a trustee or receiver appointed under 6 *Del. C.* § 18–805, or directly by the LLC or ***derivatively by its members after reviving the LLC by obtaining revocation of its certificate of cancellation***.") (emphasis added).

3. Appellants' Declaratory Judgment Claim Is Not a Nullification Claim

Appellants contend that Count IX, which seeks a declaratory judgment, is their nullification claim and the Court of Chancery erred when it found that "plaintiffs here failed to seek nullification in their pleadings."[102] As referenced above, Appellants did not state a claim for nullification and Count IX does not seek explicitly seek this relief.

First, a declaratory judgment claim is not a claim for nullification of a certificate of cancellation. In Jenzabar's review of the various cases cited by Appellants in connection with their arguments regarding nullification—not a single claim was styled as a declaratory judgment claim.[103] Rather, all the claims brought in those actions were styled as counts for nullification of a certificate of cancellation.[104] And there is a reason for this—a declaratory judgment claim is fundamentally different from a claim to nullify the cancellation of an entity.

"[T]he basic purpose of the Declaratory Judgment Act is to enable the courts to adjudicate a controversy prior to the time when a remedy is traditionally available and, thus, to advance the stage at which a matter is traditionally justiciable."[105] The

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[102] *New Media*, 2026 WL 208698, at *8.

[103] *See* Op. Br. 22 n.108 (citing cases wherein plaintiffs brought petitions to cancel nullification—none were styled as a declaratory judgment claim).

[104] We note that this is exactly what Appellants have done as petitioners in *In re New Media Investors II, LLC*, C.A. No. 2026-0226-LWW (Del. Ch.). Op. Br. at 17 n.86.

[105] *Rollins Int'l, Inc. v. Int'l Hydronics Corp.*, 303 A.2d 660, 662 (Del. 1973); *Schick*

scope and purpose of a declaratory judgment claim is to define the rights and obligations between parties to a dispute. It is fundamentally different from a nullification claim, which seeks the affirmative resurrection of a cancelled entity. Simply put, a declaratory judgment claim could perhaps establish the elements of a nullification claim, but it alone would not revive the entity.

Appellants' conduct during the litigation also indicates that they did not bring a claim for nullification. As the Court of Chancery decision noted, two months after this action was initially filed, Appellants filed a motion to nullify.[106] If Appellants had a live claim for nullification, they would not need to seek duplicative relief through an independent motion.[107] Moreover, Appellants attempted to file a certificate with the Secretary of State purporting to nullify said cancellation after this action was initiated.[108] Appellants would not have taken these actions if they actually believed they had adequately pled a nullification claim in the SAC.

Inc. v. Amalgamated Clothing & Textile Workers Union, 533 A.2d 1235, 1241 (Del. Ch. 1987) ("First, the principal, salutary purpose of the declaratory judgment procedure is to provide a technique for early resolution of disputes where a party is suffering practical consequences from uncertainty arising from the assertion by another of a legal claim.").

[106] *New Media*, 2026 WL 208698, at *8 n.97.

[107] *Id.*

[108] *Id.* at *3 ("Eleven months after commencing this suit, on March 26, 2025, the plaintiffs filed a certificate of correction with the Delaware Secretary of State.").

II. THE COURT OF CHANCERY CORRECTLY FOUND ALL OF APPELLANTS' CLAIMS WERE DERIVATIVE

A. Question Presented

Whether the Court erred when it found that claims seeking redress for the alleged loss of corporate assets and opportunities were derivative claims belonging to NMII, the entity alleged to have been harmed? This argument was preserved below at A0374–79.

B. Standard and Scope of Review

Whether a complaint states a direct or derivative claim is reviewed de novo.[109]

C. Merits of Argument

Appellants concede that the vast majority of the claims brought in the SAC are derivative under the test articulated in *Tooley*.[110] However, in their Opening Brief, Appellants pivot to a new argument—never raised below—that Counts I, III, and V state direct claims against Maginn because of his "diversion of assets during New Media II's putative wind-up."[111] First, this argument was never raised below and cannot now be raised for the first time on appeal.[112] Second, Appellants do not

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[109] *Brookfield Asset Mgmt., Inc. v. Rosson*, 261 A.3d 1251, 1262 (Del. 2021).
[110] Op. Br. at 38, 40 ("Maginn's actions predating New Media II's wind-up, including usurpation of the II-C Warrant opportunity, harmed New Media II itself.")
[111] *Id.*
[112] *Klauder v. Echo/RT Holdings, LLC*, 152 A.3d 581 (Del. 2016) ("The argument that RayTrans Distribution's assets vested in RayTrans Holdings when RayTrans Distribution dissolved was not fairly presented to the Court of Chancery and may not be raised on appeal under Rule 8. It is not discussed in the Trustee's written opposition to the motion to dismiss and was not considered by the Court of

cite to a single Delaware case that supports this view of direct versus derivative claims—wherein derivative claims are transmuted to direct claims following the wind up of an entity. Finally, as discussed above, there were no assets at the time of winding up to be distributed—the SAC alleges that the Warrants were not held by NMII at the time of winding up and the nascent claim against Maginn was not an asset to be distributed.[113] Accordingly, the Court of Chancery did not err when it found the claims were derivative.

1. Appellants Failed to Make This Argument Below and it is Waived

Appellants now contend, for the first time on appeal, that the winding up of NMII somehow transmuted NMII's derivative claims into direct claims belonging to its former members. This argument was not raised below and is waived.[114]

Supreme Court Rule 8 ("Rule 8") and the opinions interpreting it hold that—arguments not raised in response to a motion to dismiss are generally waived for purposes of appeal.[115] Only questions fairly presented to the trial court may be

Chancery.").

[113] A0254, ¶ 84; A0258, ¶ 94.

[114] A cursory review of the various portions of the Appendix where Appellants claim this argument was preserved reveals that this argument was never raised before the Court of Chancery in the briefing on the various Motions to Dismiss. *See* Op. Br. at 38 (claiming this argument was persevered at "A0270-285; A0821-823; A0894-896; A0946-947; A1206-209, 57:8-60:2.")

[115] Supr. Ct. R. 8 ("Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented."); *Roofers, Inc. v.*

presented for review on appeal. This Court has consistently held that a party's failure to raise an argument in its written opposition to a motion to dismiss means that argument has not been fairly presented to the trial court and therefore cannot be raised on appeal.

Rule 8 is even more strictly enforced on appeal with respect to arguments not raised in connection with opposing a motion to dismiss before the trial court. A "new legal theory" has not been "fairly presented to the trial court" and, accordingly, cannot be raised on appeal.[116] But that is exactly what Appellants seek to do here, inject an entirely new legal theory that certain claims became direct upon the winding up of NMII.

"[W]here a party advances an argument on appeal, we must determine whether that argument is precluded by waiver. If we conclude that the party has waived its argument for purposes of appeal, the argument can survive only if plain error occurred in the court of first instance."[117] Accordingly, the only exception to Rule 8's prohibition on new arguments is where the Supreme Court finds "plain

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Delaware Dep't of Lab., -- A.3d --, 2014 WL 7010733, at *1 (Del. Nov. 24, 2014). ("The appellant raises as its central argument on appeal a proposition it did not fairly raise below. At best, the appellant can point to a single reference to that issue in a lengthy oral argument before the Superior Court. Its briefs to the Superior Court addressing sovereign immunity do not make the argument the appellant now attempts to make. Therefore, the issue has not been properly raised below and may not be raised on appeal under Rule 8.")

[116] *Klauder*, 152 A.3d 581 n.2.

[117] *Beebe Med. Ctr., Inc. v. Bailey*, 913 A.2d 543, 551 (Del. 2006).

error" in the underlying decision.[118] Here, there could be no such finding of a plain error.[119] Accordingly, this argument was waived, cannot be raised on this appeal, and must be rejected.

2. Appellants' Argument is Unsupported by Law and their Own Pleadings

Even if Appellants' argument was not waived, it is unsupported by law and its premise is contradicted by the Appellants' own pleading. Appellants argue that when NMII was wound up, Maginn became akin to a liquidating trustee, which they claim changes the analysis "for the period between New Media II's improper dissolution and wrongful cancellation."[120] However, such an argument is belied by the pleaded facts and the case law cited.

First, Appellants do not explain how this theory squares with their alleged facts. As pled in the SAC and described in the Opening Brief, Maginn allegedly transferred the Warrants at least six months prior to NMII being wound up.[121] Accordingly, there were no Warrants to distribute during the wind up and Appellants' theory falls apart.

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[118] *Suber v. State*, 2026 WL 184867, at *1 (Del. Jan. 15, 2026).
[119] *Id.* at *5 ("Plain errors are errors under current law. An error cannot be plain 'if neither this Court nor any other binding authority (which ... includes the United States Supreme Court) has definitively ruled on the issue, and if other courts are divided.'") (citation omitted).
[120] Op. Br. at 40–41.
[121] A0254, ¶ 84; A0258, ¶ 94.

But even if the pled facts supported Appellants' new theory, the case law cited does not stand for the sweeping proposition Appellants claim. Appellants claim Vice Chancellor Glasscock previously held that "a conversion of assets in connection with the liquidation and distribution of what is the LLC equivalent of a liquidating trust states a direct claim against the managers of that LLC."[122] But the full quote puts the Court's observation into context—the Court had already determined that the complaint failed to state a claim, that it "need not reach the direct/derivative question", and was only "assum[ing]" for purposes of its analysis that such claims would be direct.[123] Accordingly, the only case cited for this proposition is inapt.

Second, Appellants continue to confuse an asset—which the LLC Act expressly states must be distributed—with a claim belonging to the LLC. As discussed above, there is no support under Delaware law for the contention that an LLC's final distributions must account for claims that belong to the LLC. Appellants do not cite a single case that supports this proposition.

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[122] Op. Br. at 41–42 (citing to *Joseph Penar Fam. Tr. v. Adams*, 2016 WL 1730765, at *6 n.56 (Del. Ch. Apr. 28, 2016), *aff'd*, 151 A.3d 896 (Del. 2016) (emphasis added).

[123] *Joseph Penar Fam. Tr. v. Adams*, 2016 WL 1730765, at *6 n.56 (Del. Ch. Apr. 28, 2016), *aff'd*, 151 A.3d 896 (Del. 2016)6 ("***I assume***, however, that a conversion of assets in connection with the liquidation and distribution of what is the LLC equivalent of a liquidating trust states a direct claim against the managers of that LLC.") (emphasis added).

III. THE COURT OF CHANCERY CORRECTLY FOUND THAT THERE WAS NO BASIS TO EXTEND EQUITABLE STANDING TO APPELLANTS

A. Question Presented

Whether the Court erred when it denied extending equitable standing to Appellants who neglected to exercise diligence to safeguard their rights? This argument was preserved below at A0369–70.

B. Standard and Scope of Review

The Court of Chancery's decision on equitable standing is subject to *de novo* review.[124]

C. Merits of Argument

Appellants' final attempt to save the critically flawed SAC is an appeal to the Court of Chancery's equitable powers—specifically an extension of equitable standing to cure them of their lack of standing. They claim this is justified "because Defendants created the standing issue they now weaponize."[125] But Appellants neglect to even confront the basis of the Court of Chancery's finding that equitable standing was unavailable to them—namely that they delayed bringing any claims until years after the statute of limitations lapsed, "neglected to exercise diligence to safeguard their rights," and the existence of "other avenues for relief exist for the

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[124] *Schoon v. Smith*, 953 A.2d 196, 200 (Del. 2008).
[125] Op. Br. at 44.

[entity], even if only theoretical" that precludes the extension of equitable standing.[126]

1. Equity Aids the Vigilant

"[E]quity aids the vigilant, not those who slumber on their rights."[127] Yet here, Appellants appeal to equity to cure their fatal standing issue—despite bringing this claim over six years after the alleged wrong occurred. This alone is fatal to their request of equitable standing.

As the Court of Chancery found, Appellants were not vigilant—in fact, they were negligent.[128] Appellants did not seek to revive NMII until months after initiating this litigation.[129] Moreover, they did not initiate this litigation until long after the statute of limitations lapsed.[130] Appellants never address these issues. Instead, Appellants recycle the same arguments that the Court-below rejected. Appellants do not—because they cannot—cite a single case that would support the application of equitable standing in this instance.

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[126] *New Media*, 2026 WL 208698, at *9 (citation omitted).
[127] *Adams v. Jankouskas*, 452 A.2d 148, 157 (Del. 1982).
[128] *New Media*, 2026 WL 208698, at *9.
[129] *Id.*
[130] *Levey v. Brownstone Asset Mgmt., LP*, 76 A.3d 764, 769 (Del. 2013) ("A filing after the expiration of the analogous limitations period is presumptively an unreasonable delay for purposes of laches."

The only case Appellants cite for the proposition that equitable standing should be extended to a former LLC member, *In re Carlisle Etcetera LLC*[131] is inapposite as the facts and circumstances bear no resemblance to those pled here. There, a former member of a two-member LLC assigned its interest in the LLC to an assignee.[132] Despite being treated as a member, the assignee was never formally admitted as a member.[133] When the LLC became deadlocked, the assignee sought dissolution and defendants moved to dismiss on standing grounds—seeking to use the deadlock as leverage in their business dispute. The Court granted equitable standing to the assignee because there were no other avenues for relief[134] and in the *status quo*, the assignee would remain "locked-in as a silent and powerless passive investor" which was "contrary to the bargain the parties struck."[135] The Court also noted that "had the parties finalized the Proposed LLC Agreement, or acted in accordance with their agreement in principle, then WU Sub would be a member and have standing to seek dissolution under Section 18–802."[136] These facts are easily distinguishable to the facts pled here. First, as discussed below, other avenues of relief are available. Second, the assignee there acted with alacrity—there were no

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[131] 114 A.3d 592 (Del. Ch. 2015).
[132] *Id.* at 595.
[133] *Id.* at 596.
[134] Essentially there was a no other member of the LLC who could seek dissolution.
[135] *Id.* at 606.
[136] *Id.*

allegations of delay or negligence that would preclude equitable standing's extension. Here, Appellants own negligent conduct precludes the extension of equitable standing to them.

2. Other Avenues of Relief Are Theoretically Available

Equitable standing is also not available to Appellants because other theoretical avenues of relief are available. This alone precludes the extension of equitable standing to them.[137]

Appellants do not even attempt to deal with this issue in their Opening Brief. *Schoon* is instructive. There, the Court noted that there was no "complete failure of justice" supporting the application of equitable standing because another stockholder could pursue derivative litigation.[138] The *Schoon* Court rejected the Schoon's argument that permitting Schoon's action to proceed would be more "practical" noting that its "proposed efficiency overlooks the reason why the equitable standing doctrine was adopted, which (to reiterate) is to prevent a complete failure of justice on behalf of the corporation."[139] Here, as described in the Opening Brief, by filing their nullification claim in a new action,[140] Appellants have already shown that

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[137] *See New Media,* 2026 WL 208698, at *9; *SDF Funding LLC v. Fry*, 2022 WL 1511594, at *9 (Del. Ch. May 13, 2022) ("where other avenues for relief exist for the corporation, even if only theoretical, extending the doctrine of equitable standing is unnecessary.").
[138] *Schoon*, 953 A.2d at 208.
[139] *Id.*
[140] Op. Br. at 17 n.86. Appellants clearly believe such theoretical relief exists,

"theoretical" "other avenues of relief exist."[141] Any arguments regarding practicalities or appeals to justice fail because this theoretical avenue of relief exists for Appellants. Accordingly, the Court of Chancery did not err when it refused to extend equitable standing to Appellants—the Court was simply applying settled Delaware law.

otherwise, why file a new action.

[141] *SDF Funding LLC*, 2022 WL 1511594 at *9.

CONCLUSION

For the foregoing reasons, Jenzabar respectfully requests that this Court affirm the judgment of the Court of Chancery.

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